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National security and the news media

By TOM POLGAR

On June 5 in Baltimore a federal jury found Ronald W. Pelton guilty of selling important secrets to the Soviet Union. Pelton's was but one of several espionage cases that came to public attention in 1985 — the year of the spy — but was of unusual significance because

- It demonstrated once again U.S. vulnerability to Soviet espionage;
- It forced the U.S. government for the first time into a public discussion of communications intelligence collection, and
- It brought into sharp focus the problems of press coverage in a criminal case involving matters of national security. In a nutshell: Do the American news media have the right to acquaint the American people with the details of what Pelton was accused of having delivered to his Soviet masters?

Major newspapers and NBC maintain that they have such right, based on the First Amendment to the Constitution: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." They also invoke unwritten law or American tradition on the public's right to know. Indeed, they argue, why should the American public be denied the information that, the U.S. government concedes, has been given to the Soviets by Pelton?

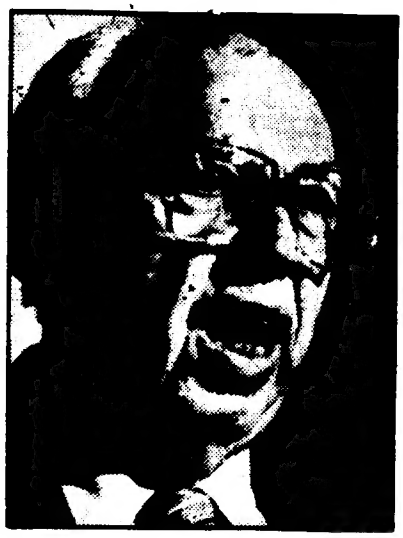
The issue is seen differently by the director of Central Intelligence, William J. Casey, whose statutory responsibilities include "protecting intelligence sources and methods from unauthorized disclosure," according to the National Security Act of 1947.

On May 19 Casey announced that he had asked the Justice Department to consider prosecuting NBC for its report on the communications intelligence collection that Pelton had betrayed to the Soviets years ago.

On May 28 Casey and National Security Agency Director Lt. Gen. William E. Odom issued an unusual statement: "Those reporting on the [Pelton] trial should be cautioned against speculation and reporting details beyond the information actually released at the trial. Such speculation and additional facts are not authorized disclosures . . ."

Leaving aside the question whether it is possible to curb speculation by edict, the statement of the two intelligence chiefs underscored the great sensitivity and significance of communications intelligence.

The ability to read secret communications could be and has often been the difference between victory and defeat,



CIA Director William J. Casey's statutory responsibilities include "protecting intelligence sources and methods from unauthorized disclosure."

between life and death. For example, in World War I the irrefutable proof that Imperial Germany conspired to involve Mexico in a war against the United States was the product of communications intelligence. The ingenuity of British intelligence and inadequate communications security on the German side produced a steady flow of information that convinced President Woodrow Wilson to bring the United States into war on the Allied side — assuring the defeat of Germany.

In World War II the achievements of Allied communications intelligence were a major factor in the victories in Europe and in the Pacific.

The superiority of the Allied intelligence effort clearly helped to gain the time needed to deploy and bring to bear U.S. manpower and materiel advantages. A single leak could have destroyed the tremendous intelligence effort that may have represented the winning margin in what was from 1941 through 1944 "a damned close-run thing" — to use the phrase of the Duke of Wellington about the Battle of Waterloo.

Pelton

It is for good reason that all countries attempt to provide maximum protection to their secret communications. No other single category of intelligence can open such a wide window of vulnerability. Because of this, Congress passed a law in 1950, Section 798 of the U.S. Criminal Code, to prohibit revelation of U.S. activities in the sphere of communications intelligence.

As long as the law is on the books it would seem difficult to fault Casey for bringing to the Justice Department's attention his view that there has been a violation of that law.

Prosecution of this or any other case involving intelligence considerations is, of course, within the discretion of the Justice Department. The director of Central Intelligence has no authority in the area of law enforcement. The law that created the CIA, the National Security Act of 1947, specified that "the Agency shall have no police, subpoena, law enforcement or internal security functions" and the CIA has none.

The argument over the merits of Bill Casey's recommendations to the Justice Department concerning NBC should not be fought between the information media and the intelligence community. Casey did what he felt he had to do in accordance with existing law. If the 1950 statute on communications intelligence is defective — as it may well be — the remedy lies with the courts and with Congress, but not in attempts to weaken the CIA director's resolve and responsibility to afford the best possible protection to the sources and methods of U.S. intelligence collection.

The government cannot operate without the right and the ability to keep secrets. This was recognized and reflected throughout U.S. history, beginning with the Founding Fathers. As early as November 1775 the Continental Congress created a "Committee of Secret Correspondence," which exercised broad discretionary power to safeguard the secrecy of matters pertaining to its agents, as cited by the U.S. Court of Appeals for the District of Columbia (*Halperin v. Central Intelligence Agency*, 1980). In its opinion holding for the government the court also quoted from a letter dated July 26, 1777, to Col. Elias Dayton from Gen. George Washington:

"The necessity of procuring good intelligence is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most enterprises of this kind, and for want of it, they are generally defeated . . ."

This is as true today as it was then. I learned early from my own experiences that foreign sources dealing with American officials just hate to see their information surfaced in news media, rightly fearing that such disclosures may have detrimental effects on their positions or security.

The impact of a security leak on the effectiveness and life expectancy of an American spy in hostile territory is so obvious that it requires no discussion.

Current controversies about leaks and unauthorized disclosures do not involve accusations that representatives of the information media would want to jeopardize the continuing utility of U.S. intelligence assets or otherwise damage national security. There appears to be, however, a difference of opinion about the proper limits and requirements of national security considerations. There is also a feeling or suspicion that the administration is all too prone to throw the cloak of secrecy — in the name of national security — to cover mistakes, embarrassments, confusions and defeats.

Rare is the day when the administration protests about leaks that support its position. Concern is always expressed when information surfaces that may tend to contradict or damage the administration's programs or image.

The practice of trying to suppress information that may be politically damaging did not start with the Reagan administration. It is an almost automatic response of any bureaucracy anywhere. The government seeks to hide — the news media seek to discover. This is a natural routine.

Different today is the almost daily occurrence of policy-level officials or legislators trying to buttress the administration's positions by citing "secret intelligence" that would allegedly prove the point and that had just been disclosed in a secret report or hearing — "but because it is top secret I cannot tell you the details."

This is a very bad practice and an invitation for leaks. If there is secret intelligence, let there be no talk about it in public. Such intelligence should remain in the closed precincts for which it was destined, as a basis for policy formulation, not as points in an argument or to polish political positions or self-image.

When the government originates semi-disclosures or enticing hints about the alleged contents of secret intelligence reports, it virtually challenges the information media to try to get the whole story, if only to verify that the secret reports do in fact contain the information they are alleged to reflect. At best intelligence can be no better than the people who use it. Sad but true that journalists may at times have good reason to believe that the interpretation of the reported intelligence may be erroneous or self-serving, with an eye not so much on winning the next battle against foreign foes, but the next election at home.

In the periodic confrontations between government and news media, it is well to remember that our Constitution is one of compromises. Our system is a continuing exercise in checks and balances. The Founding Fathers want-

ed to get away from absolutism in any form. Their concept was reinforced by a vast complex of legislation and court decisions that make clear that even the First Amendment does not confer absolute rights to the individual or to the information industry.

Most of us accept that freedom of speech must have sensible limits. No one can claim the right to shout "Fire!" in a crowded theater when there is no fire. There are also other restrictions that evolved — for example, in the areas of individual privacy, libel, pornography, conspiracy, sedition and national security. Some of the restrictions do not lend themselves to easy definition and there are many disputed areas.

In matters involving national security considerations, the judiciary has followed the intent of Congress that certain matters relating to the government's foreign activities should be among the powers vested by the Constitution in the president, that is to say the executive branch. With President Reagan's appointments to the federal bench, this longstanding practice is unlikely to change. It is reasonable to expect that the courts will continue to rule in favor of the government on matters involving secrecy and other matters of executive discretion in the conduct of intelligence and other foreign activities.

At the same time there is legitimate concern that the White House and the CIA, as the lead horse of the intelligence community, have yet to find a satisfactory formula for bringing intelligence information — with the appropriate safeguards — into the public domain. This would be of small importance if the director of Central Intelligence were to conduct himself like his British counterpart: out of the limelight, without overt influence on policy, virtually unknown to the public. Alas, in the United States the head of the CIA is a very public figure and the incumbent, Bill Casey, is a man of high profile. He is a member of the Cabinet. He is an activist of immense capacity, experience and knowledge. He has firm opinions and the courage of his convictions when he takes a public position on a controversial topic, inevitably drawing on the secret, privileged information to which he has continuing access. The information media would seem to have good reason to want to know and to publish how he arrived at his positions and whether or not there may be other intelligence within the CIA from which different conclusions might be drawn. When the director of Central Intelligence becomes an advocate of policy, then intelligence can hardly be expected to remain outside the political arena.

Our ship of state leaks from the top, primarily because of domestic political considerations. It is the most senior officials who set bad examples that encourage others, who may have different political positions or whose conscience may dictate unorthodox methods, to provide their version of the truth to the public and to Congress.

The White House and other top people of the administration must take the lead in exercising greater discipline in the public handling of secret intelligence. Only with good example from the most senior levels could the campaign against leaks and other unauthorized disclosures gain credibility.

As a former intelligence operations officer, I cannot be very enthusiastic about the declassification of secret intelligence. I have no doubt, however, that much of our information is vastly over-classified. I also recognize that there may be situations in which national policy considerations call for the release of the substance of the intelligence on which policy is or may be based.

When such disclosures are necessary, they should be made in a nonpartisan manner, without favoritism and with consideration for the protection of sources and methods as well as the equities of the news media.

Our unique system of government can function only when there is good will and a willingness to engage in reasonable give-and-take. The administration can help toward creating an environment in which there is fair cooperation between government and the information media, but in the final analysis it is the administration's responsibility to protect the intelligence geese that can lay the golden eggs.

The First Amendment rights are essential ingredients of the American way of life but even so must be considered in the context of the national interest. As the Supreme Court reminded in *Haig v. Agee* in 1981:

"While the Constitution protects against the invasion of individual rights, it is not a suicide pact."

I would think that the same considerations would inhibit the invocation of the First Amendment as license to disclose sensitive information bearing on our national security.

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